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NO. 57293-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RONALD LUNSFORD and ESTER LUNSFORD,

Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Respondent.

Amended
BRIEF OF RESPONDENT

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I. RESPONDENT'S STATEMENT OF THE ISSUES

The trial court (King County Superior Court Judge Sharon Armstrong) granted partial summary judgment to Respondent Saberhagen Holdings, Inc. ("Saberhagen") and dismissed Appellants Ronald Lunsford's and Esther Lunsford's ("the Lunsfords") strict product liability claims arising from alleged exposure to asbestos in 1958.

The following issues are presented:

1. Did the trial court correctly dismiss the Lunsfords' strict liability claim against Saberhagen, where Mr. Lunsford's alleged injurious exposure to the asbestos products of Saberhagen's predecessor occurred in 1958, where Washington product liability law in effect in 1958 did not permit such strict liability claims, and where such claims were not permitted against product sellers under Washington law until 17 years later in 1975?

2. Should this Court refuse to consider the Lunsfords' new arguments for the retroactive application of *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969) and *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542, P.2d 774 (1975), where the Lunsfords failed to present those arguments in the trial court?

3. Did the trial court correctly deny the Lunsfords' motion to strike excerpts of publications of the American Law Institute ("ALI"),

where those materials were akin to legislative history of Restatement (Second) of Torts § 402A and in any event were "ancient documents" under ER 803(a)(16)?

II. RESPONDENT'S STATEMENT OF THE CASE

A. Ronald Lunsford's Allegations of Asbestos Exposure in 1958.

Following a prior asbestos lawsuit in California against 37 companies, the Lunsfords filed the present lawsuit against Saberhagen Holdings, Inc. ("Saberhagen") in 2002. CP 3, 70, 88-94. They alleged that Mr. Lunsford developed mesothelioma as a result of nearly three decades of various occupational and non-occupational, "household" exposures to asbestos, beginning in 1950 and continuing into the 1970s. CP 37. His occupational exposures included exposures while serving in the U.S. Navy, on board ships, at shipyards, and at repair facilities. His household exposures included 15 years of exposure from 1950-1965 to asbestos fibers allegedly brought home on the clothing of his father and his uncle, who were insulators by trade. *Id.*

The claims against Saberhagen concern only Mr. Lunsford's household exposure for a few weeks in 1958, when his father allegedly worked briefly as an insulator for Saberhagen's alleged predecessor, the

Brower Company[1] ("Brower") on a job at the Texaco Refinery in Anacortes, Washington. CP 37, 72, 84. On that job, Mr. Lunsford's father allegedly installed asbestos-containing insulation, fibers from which clung to his clothing and were carried home. CP 138-39. Mr. Lunsford claims that as a child he was exposed to those asbestos fibers on his father's clothes, hat, tools and car, and that such exposure caused him to contract the mesothelioma with which he was purportedly diagnosed 42 years later in 2000. *Id.* The Lunsfords asserted negligence, strict liability, false representation and loss of consortium claims against Saberhagen. CP 6, 9, 33, 34. They also asserted various claims against other entities[2] for civil conspiracy and deceit. CP 14, 31.

B. Saberhagen's First Motion for Partial Summary Judgment and the *Lunsford I* Appeal.

Saberhagen first filed a motion for partial summary judgment seeking dismissal of the Lunsfords' strict liability claims on the grounds that Mr. Lunsford that was not "user or consumer" of a defective product within the meaning of Restatement (Second) of Torts § 402A ("402A") and therefore was not entitled to assert a strict liability claim. The trial

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[1] Solely for the purposes of the summary judgment proceedings below (and accordingly in this appeal), Saberhagen has conceded that it would be liable for Brower's acts. CP 53.

[2] Metropolitan Life Insurance Co., Johns-Manville, Raymark Industries, U.S. Gypsum Co., Pneumo-Abex Corp., T&N PLC, Owens-Illinois, et al. CP 14-32.

court agreed and entered partial summary judgment. On appeal, this Court reversed on policy considerations, finding no clear authority on the question presented. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792, 106 P.3d 808 (2005) ("*Lunsford I*").

In *Lunsford I*, Saberhagen also argued, as an alternate basis for affirming, that the Lunsfords' strict products liability claim under 402A (adopted in Washington as to product manufacturers in 1969[3] and as to product sellers in 1975[4]) was subject to dismissal because no such claim was available in Washington in 1958 when the alleged exposure occurred. The Lunsfords objected to consideration of this argument on the grounds that Saberhagen had not first presented its argument and supporting authorities to the trial court and that they had not had the opportunity to conduct discovery, present evidence and oppose the issue.[5] This Court declined to address the issue, inviting the parties to raise it below. 125 Wn. App. at 793.

C. Saberhagen's Second Motion for Partial Summary Judgment.

Promptly upon remand, Saberhagen filed a motion for partial summary judgment placing the issue squarely before the trial court and the Lunsfords. Saberhagen demonstrated that, however Washington tort law

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[3] *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969).
[4] *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542, P.2d 774 (1975).
[5] Reply Brief of Appellants at 1-2, 4-5, *Lunsford I.*

may have developed in the decades that followed, no strict products liability cause of action existed *in 1958* when the alleged exposure to Brower products occurred and Mr. Lunsford's claim arose. CP 54-63. Restatement (Second) of Torts §402A, which created a strict liability cause of action, had not been adopted in Washington or anywhere else in 1958 (indeed, it had not yet been published by the American Law Institute, nor even conceived of by its eventual drafter, William Prosser).

Relying upon the very same authorities presented in its earlier appellate briefing in *Lunsford I*, Saberhagen canvassed the historical development of strict products liability law in Washington and nationally, focusing upon the law as it existed in 1958, since that is the date of Mr. Lunsford's alleged exposure to dust from Brower products and consequently the date on which his claim arose. CP 54, *citing Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997).

Saberhagen showed that in 1958, the only available claims against product manufacturers and retailers were those that sounded either in *negligence* or *warranty*. Although a warranty claim did not require a showing of fault, it did however typically require *privity,* which Mr. Lunsford lacked. CP 54-61. *See* discussion *infra* at 9-12. Accordingly, Saberhagen argued that Mr. Lunsford had no basis under the applicable

law for his "strict liability" claim and that, accordingly it should be dismissed.

D. The Lunsfords' Opposition to Saberhagen's Motion for Partial Summary Judgment.

The Lunsfords filed an 8-page memorandum in opposition to Saberhagen's motion containing two basic arguments: (1) Washington law in 1958 *did* in fact allow "strict liability" claims for persons such as Mr. Lunsford prior to the adoption of 402A; 402A was merely a "logical reformulation of *existing law*"; and (2) Saberhagen must be wrong since several Washington appellate decisions[6] have discussed strict liability claims in asbestos cases without mentioning any "problem" as to whether strict liability existed prior to the adoption of 402A.[7] CP 141-44.

By separate motion, the Lunsfords asked the trial court to strike as inadmissible hearsay certain materials prepared by the American Law Institute (ALI) and submitted with Saberhagen's summary judgment motion. CP 132-34, 113-26. These published materials were cited by Saberhagen (and copies were submitted to the trial court for its

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[6] *Mavroudis, supra; Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993); *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 853 P.2d 908 (1993); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581, *rev. denied* 130 Wn.2d 1009 (1996).

[7] Notably absent was any argument that the Washington Supreme Court's adoption of Restatement 402A was retroactive according to general principles of retroactivity of judicial decisions - - the argument that now forms the core of their appellate brief. *See* Brief of Appellants at 16-19.

convenience) in order to illuminate the ALI's consideration and development of what ultimately was published in 1965 as 402A. CP 57-61, 266-69.

E. The Trial Court's Granting of Saberhagen's Motion for Partial Summary Judgment and Denial of the Lunsfords' Motion to Strike.

Superior Court Judge Sharon Armstrong granted Saberhagen's motion for partial summary judgment and denied the Lunsfords' motion to strike on October 21, 2005. RP 17, 28-29; CP 271-75. This appeal has followed.[8] CP 277-90.

III. ARGUMENT

A. The Trial Court Properly Dismissed the Lunsfords' "Strict Liability" Claim for Exposure in 1958, Since No Such Claim Existed Under Applicable Washington Law in 1958.

This Court should affirm the trial court's dismissal of the Lunsfords' strict liability claim. Outside of warranty theory, strict products liability did not exist in Washington in 1958 when Mr. Lunsford claims he was exposed to Brower-supplied products. Indeed, 402A had not even been drafted or even conceived of in 1958. It was not published

[8]The Lunsfords filed a Notice of Appeal and a Notice of Discretionary Review on November 17, 2005 seeking review of the order granting partial summary judgment. CP 277-82, 283-88. They filed an Amended Notice of Appeal to Court of Appeals Division 1 on December 3, 2005. On January 3, 2006, pursuant to stipulation of the parties, the trial court entered an order certifying under CR 54(b) the partial summary judgment order. CP 289-90. By notation ruling on January 27, 2006, Commissioner Susan Craighead directed that the appeal could proceed.

until 1965, was not adopted in Washington as to manufacturers until 1969, and was not applied to product sellers until 1975. Mr. Lunsford's effort to avail himself of a tort theory that would not exist in Washington until nearly two decades *after* his alleged injury in 1958 was properly rejected by the trial court. Mr. Lunsford was entitled to the *same* rights and remedies available to any other person injured by a product in 1958 - - no more and no less.

1. Because Mr. Lunsford claims exposure to dust from Brower products *in 1958*, his claims arose *in 1958* and are governed by the law in effect *in 1958*.

Mr. Lunsford claims that he was exposed to asbestos dust from Brower-supplied products sometime in 1958. That is when his cause of action arose. *See Mavroudis, supra,* 86 Wn. App. at 33-34, *citing Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 472, 632, 635, 804 P.2d 659 (1991). While his cause of action may not have *accrued* for statute of limitations purposes until he discovered his injury, it is the date on which a cause of action *arises*, not on which it *accrues,* that determines the applicable law.[9] *Id.*

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[9] Here as in the trial court, the Lunsfords appear to thoroughly confuse the distinct legal concepts of when a claim *arises* and when it *accrues*. *See* Brief of Appellants at 14-15 (citing cases to show when a cause of action *accrues* for statute of limitations purposes). Indeed, the Lunsfords seem to argue that the law applicable to their claims is the Washington Products Liability Act, LAWS OF 1981, ch.27, since that is "The Law In Effect At The Time [Mr. Lunsford's] Claims Accrued." *Id.* at 14 (Headnote C), 15 n.4. *See also* RP 19-21.

2. A strict liability cause of action against product sellers such as Brower *did not exist* under Washington law in 1958 and therefore is not an available claim arising from Mr. Lunsford's exposure in 1958.

Mr. Lunsford seeks to hold Saberhagen, a product seller, strictly liable pursuant to 402A.[10] However, 402A did not even exist in 1958 when his cause of action arose and would not become the law in Washington with respect to product sellers until 1975, *17 years later*, following a dramatic, unforeseen and unprecedented development in American tort law. Because neither 402A nor any other applicable cause of action for strict liability existed in Washington in 1958, Mr. Lunsford's strict liability claim was properly dismissed.

a. Section 402A did not exist in 1958 and did not become the law in Washington until the *Ulmer* decision in 1969 (as to manufacturers) and the *Tabert* decision in 1975 (as to product sellers).

Section 402A was first published by the ALI in 1965. It provided for strict liability of sellers of defective products. When it was first

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[10] (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS §402A (1965).

adopted as the law by the Washington Supreme Court in 1969, it was only adopted with respect to *manufacturers,* not product sellers. *Ulmer,* 75 Wn.2d at 530. The court did not adopt 402A with respect to product sellers until 1975. *Tabert*, 86 Wn.2d at 150.

b. The *Ulmer* and *Tabert* decisions established new principles of law and new causes of action having no counter-parts or practical equivalents in prior Washington law as it existed in 1958.

By imposing strict liability upon product manufacturers and sellers, the *Ulmer* and *Tabert* courts plainly and dramatically changed prior law.[11] Indeed, in 1958 and before, the general rule in Washington and elsewhere was that product sellers could not be held strictly liable for injuries caused by defective products. *See Larson v. Farmers' Warehouse Co.*, 161 Wash. 640, 644, 297 P. 753 (1931) (court noted that general rule was that product sellers were not subject to claims such as "implied warranty"). Claims against product manufacturers and retailers sounded either in negligence or warranty. Although warranty did not require fault,

[11] The *Tabert* and *Ulmer* decisions received considerable public attention when they were handed down. Each case reflected a substantial change in the law, and each was immediately reported in the local newspapers. *See* CP 101 (SEATTLE POST-INTELLIGENCER, Mar. 21, 1969: "In a far-reaching decision with consumer protection impact, the State Supreme Court yesterday held that an auto maker or other manufacturer, no matter how careful he is, is liable for damages to the user if the product fails."); CP 98-100 (SEATTLE TIMES, Nov. 27, 1975: "*Supreme Court Says Sellers are Liable* . . . The State Supreme Court extended the boundaries of consumer protection yesterday by widening the liability for faulty products to include not just the maker, but the seller").

it did require privity. *See La Hue v. Coca-Cola Bottling Co.*, 50 Wn.2d 645, 647, 314 P.2d 421 (1957).

There were exceptions to this general rule. Courts in Washington and elsewhere had earlier carved out narrow privity exceptions in *food product* cases, characterizing the claim as one of implied warranty. *See Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). Such exceptions were based upon the theory that food occupies a place of special importance and consequently the law implies a special warranty that food sold is wholesome and fit for consumption. *Id.; Brewer v. Oriard Powder Co.*, 66 Wn. 2d 187, 191, 401 P.2d 844 (1965); RESTATEMENT (SECOND) OF TORTS §402A at 74B-75 (Council Draft No. 8, 1960) [CP 107-08]. This and other similar exceptions notwithstanding,[12] "the general rule" in 1958 was *non*-liability of the manufacturer absent privity.[13] *See La Hue*, 50 Wn.2d at 647.

[12] Apparently based upon the same rationale as the food exception, i.e., that such items are intended to come into direct contact with the human body, several Washington decisions recognized exceptions for clothing, drugs and cosmetics. *See, e.g., Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848 (1952); *Brewer,* 66 Wn. 2d at 191.

[13] Indeed, the development of tort principles that ultimately led from this "general rule" of non-liability to the broad strict liability of 402A had hardly even *begun* in 1958, as shown by the proceedings of the ALI. *See* discussion *infra* at 18-22.

3. The Lunsfords' "strict liability" claim lacked a basis in applicable law of 1958 and was properly dismissed.

In response to this outline of the law as it existed in 1958 reflecting a general rule of no "strict" liability absent privity, the Lunsfords' did not cite a single pre-1958 case demonstrating a different rule or an historical exception under which Mr. Lunsford might qualify. Indeed, despite their argument, in the trial court and now on appeal (CP 141; Brief of Appellants at 4-5), that *Ulmer* and *Tabert* did not significantly change pre-existing state law, they have failed to cite a single pre-1958 case to support that argument. The Lunsfords did not contend that Mr. Lunsford was in privity with Brower in 1958,[14] or that he would otherwise qualify to assert a warranty or implied warranty claim under the law in effect at that time. Accordingly, the trial court properly dismissed the Lunsfords' strict liability claim.

[14] It is significant that Mr. Lunsford not only lacks privity with Brower; he lacks privity *with anyone*. Saberhagen is not aware of any pre-1958 Washington case allowing an implied warranty claim to a plaintiff who did not at least buy the defective product from *someone*. Prosser himself canvassed the case law in 1964 and told the ALI that he had found no such cases allowing bystanders to assert strict liability claims. *See* 41 A.L.I PROC. 352-53 (1964); discussion *infra* at 19-21.

B. The Lunsfords' "Implicit Ratification" Argument Has No Merit As It Relies Upon The *Silence* Of Prior Appellate Decisions, Not Their *Holdings*.

Instead of addressing Saberhagen's argument by citing pre-1958 cases demonstrating that there *was* in fact a legal basis for a strict liability claim for which Mr. Lunsford would qualify, or by distinguishing the considerable contrary authorities presented by Saberhagen, the Lunsfords' opposition rested almost entirely on cases that *did not* raise the issue.

In the trial court and again in this Court, the Lunsfords argue that *Ulmer* and *Tabert*, and for that matter, 402A itself, did not represent any dramatic change in the law of products liability in Washington and were nothing more than a "logical reformulation of existing law." Proof of this, they argue, is found in the fact that several Washington appellate decisions in asbestos cases involving pre-402A exposures did not say otherwise and therefore "implicitly ratified" the application of 402A to pre-402A exposures. CP 143-44; RP 18, 20-24; Brief of Appellants at 4-5, 10-14.

The failure of prior Washington appellate decisions in asbestos cases to comment upon the question of whether strict liability is available in a case arising in 1958 demonstrates only that this is an issue of first impression. That issue simply never arose in those cases, very likely

because (as the Lunsfords' counsel conceded at oral argument[15]), the parties simply didn't think of it.

Contrary to the Lunsfords' suggestion, the issue in *Krivanek,*[16] *Viereck,*[17] and *Mavroudis* was not what law applied *before* the adoption of 402A, but whether the Washington Product Liability Act, LAWS OF 1981, ch.27 ("WLPA"), enacted *thereafter* (1981) was applicable.[18] Nowhere in these or the other cases cited by the Lunsfords did the courts consider the issue raised by Saberhagen: whether in a case governed by 1958 law, an injured asbestos bystander lacking privity with anyone has a strict liability claim against a product seller.[19] Accordingly, those cases are irrelevant, as are any passing references they may contain to the applicability of pre-WPLA law. *See State ex rel. Evergreen Freedom Found. v. NEA*, 119 Wn. App. 445, 452, 81 P.3d 911 (2003) (appellate court's comments that

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[15] RP 21 ("They didn't think to make this [i.e., Saberhagen's] argument perhaps").
[16] *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993), *rev. denied* 124 Wn.2d 1005 (1994).
[17] *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581, *rev. denied* 130 Wn.2d 1009 (1996).
[18] In each case, the appellate court was asked to determine whether the trial court had erred in not giving instructions based on the provisions of WPLA. By its terms, WPLA applied only to claims "arising on or after July 26, 1981." RCW 4.22.920. In each case, the appellate court held that the plaintiff's claim had arisen *before* the effective date of WPLA, because most of his exposure had occurred before that date, and therefore WPLA did not apply.
[19] The Lunsfords mistakenly characterize *Falk v. Keene Corp.* 113 Wn.2d 645, 782 P.2d 974 (1989) as a case that applied *pre*-WPLA common law to a case in which the plaintiff was exposed in 1947-53. Brief of Appellants at 10-11. In fact, *Falk* was a defective design asbestos case brought *under the WPLA*. *Id.* at 646.

have no bearing on the outcome of a decision are dicta and of no precedential value).

C. The Lunsfords' New "Retroactivity Analysis" Argument for the Retroactive Application of *Ulmer* and *Tabert* Was Not Presented Below and Ignores Key Considerations.

At the core of the Lunsfords' appellate brief is a new "retroactivity analysis" argument: that *Ulmer* and *Tabert* are *required* to be applied retroactively according to general principles of judicial decision-making. Brief of Appellants at 6, 16-19. Of course, if in fact *Ulmer* and *Tabert* did not substantially change the law of strict liability in effect in 1958 (as the Lunsfords argue elsewhere but have supported with no pre-1958 authority), there would seem to be little point to this argument. In any event, this argument inaccurately glosses over complicated legal issues that go to the philosophical basis for state and federal adjudication and ignores much else that is inconvenient to the Lunsfords' position but indisputable in the unusual circumstances of this case. Moreover, this argument was *never* raised below. It should not be considered now.

1. The Lunsfords' "retroactively analysis" was not raised below and should not be considered for the first time on appeal.

In opposing Saberhagen's motion for partial summary judgment, the Lunsfords never advanced the argument that judicial decisions are generally applied retroactively and that consequently *Ulmer* and *Tabert*

(and their adoption of 402A as to manufacturers and sellers) should also be so applied. Rather, they argued that those cases, and 402A itself, did not represent any dramatic change in the law of products liability in Washington and were nothing more than a "logical reformulation of existing law." The proof of this, they argued, was that several later Washington appellate decisions in asbestos cases were silent on the issue and therefore "implicitly ratified" the application of 402A to pre-402A exposures. The Lunsfords *never* argued that the *Ulmer* and *Tabert* decisions adopting 402A apply retroactively to cases arising at an earlier time according to a presumption of retroactivity of judicial decisions. This argument is entirely new on appeal and it improperly invites the Court to engage in a profoundly different inquiry than that performed by the trial court. Consequently, it should not be considered. *See* RAP 9.12 (in reviewing summary judgment order, "appellate court will consider only evidence and issues called to the attention of the trial court"); *Cotton v. Kronenberg*, 111 Wn. App. 258, 273, 44 P.3d 878 (2002) (refusing to consider summary judgment argument that a party failed to make to the trial court); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 296, 299, 38 P.3d 1024 (2002) (same). *See also* RAP 2.5(a).

2. The Lunsfords' "retroactivity analysis" improperly ignores the dramatic, unforeseeable changes in products liability law between 1958 and 1975, and the unfair, undesirable consequences of imposing *1975* products liability theories upon *1958* product sellers.

The starting point for the Lunsfords' new argument is the proposition that prospective (i.e., *non*-retroactive) application of a judicial decision is appropriate only where (1) a decision has established a new principle of law that (2) overrules past precedent (3) on which litigants may have relied. Brief of Appellants at 16, *citing Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 613, 94 P.3d 961 (2004). In fact, *Carrillo* identified several other relevant considerations:

> Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, *or by deciding an issue of first impression whose resolution was not clearly foreshadowed*; (2) *weigh the merits and demerits in each case* by looking to the prior history of the rule in question, *its purpose and effect and whether retrospective operation will further or retard its operation*; and (3) *weigh the inequity* imposed by retroactive application.

122 Wn. App. at 613 (emphasis added), *quoting Nat'l Can Corp. v. Dep't of Revenue*, 109 Wn.2d 878, 881, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988) *citing Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.

Ct. 349, 30 L.Ed.2d 296 (1971).[20] The Lunsfords' contention that "*Ulmer* and *Tabert* do none of those things" simply ignores the overwhelming evidence to the contrary.

a. The *Ulmer* and *Tabert* decisions established *new* principles of law and *new* causes of action that were not foreshadowed or foreseeable in 1958.

By adopting 402A and imposing strict liability upon product manufacturers and sellers, *Ulmer* and *Tabert* dramatically changed prior

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[20] Although the Washington courts have recognized that the holdings of *Chevron Oil* and consequently *National Can* have been limited (*see Digital Equip. Corp. v. Dep't of Revenue,* 129 Wn.2d 177, 916 P.2d 933 (1996), *cert. denied,* 520 U.S. 1273 (1997), *citing James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)), the limitation of *Chevron Oil* simply makes *Chevron Oil* inapplicable with regard to decisions that involve ***federal*** law, as opposed to cases decided by the state courts involving non-constitutional questions. *Beam Distilling*, 501 U.S. at 540. The reason for the distinction lies in the "declaratory theory" of constitutional law, under which there is no federal general common law -- federal courts only interpret the law as set forth in the Constitution and the Laws of the United States. *Beam Distilling*, 501 U.S. at 535-36 ("[Retroactive application of judicial decisions] also reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it.") *See also, Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) (holding that decision on constitutional questions would be given retroactive effect pursuant to *Beam Distilling*). Of course, this case does not involve a question of federal or constitutional law and *Beam Distilling* and the line of cases flowing from it are therefore inapplicable.

By contrast, *state* courts are generally not explicitly prohibited from "making" law and, consequently, engage more freely in *Chevron Oil* type retroactivity balancing tests despite the holding in *Beam Distilling*. *See e.g., Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 87-88, 223 Ill. Dec. 451, 679 N.E.2d 1224 (Ill. 1997); *Claxton v. Waters*, 34 Cal. 4th 367, 378-79, 18 Cal. Rptr. 3d 246, 96 P.3d 496 (2004); *Kindred Hospitals v. Lutrell*, 190 S.W.3d 916, 922 (Ky. 2006); *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 385-86, 127 Cal. Rptr. 2d 516, 58 P.3d 367, 385 (2002); *Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

Ulmer and *Tabert* plainly made new law when they adopted 402A, which was the functional equivalent of a statute, albeit one "enacted" by the judicial branch. *Cf. Falk, supra,* 113 Wn.2d at 648-49. Notably, statutes are ordinarily given prospective application only. *See Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002).

law. *See* discussion *supra* at 9-11. While the vast majority of Washington appellate decisions receive little fanfare or public notice, *Ulmer* and *Tabert* were immediately reported in the local newspapers and characterized as far reaching decisions having significant implications for consumers, manufacturers and sellers alike. CP 98-101.

The drafting history of §402A itself graphically demonstrates the extraordinary speed and breathtaking scope of the changes in American tort law during this period - - changes that had barely begun in 1958, when Mr. Lunsford was allegedly exposed to dust from Brower products. In 1958, the Advisory Committee of the American Law Institute (led by William L. Prosser, Reporter) was well-aware of the general rule regarding strict liability and Washington's (and other states') implied warranty exception for food products. In January 1958, the Advisory Committee discussed a proposed new restatement section, §402A, that would reflect this rule and create strict liability in tort for sellers of *food products only.*[21] *See* RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958) [CP 110-12].

Following consideration by the ALI Council, the Preliminary Draft was first presented to the ALI in 1961. However, Prosser told the Institute

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[21] Prosser identified Washington as one of 15 states following the food products rule in 1958. CP 111-12.

that in the few intervening years that had elapsed since the Preliminary Draft had been written, much had changed in the law of strict liability, and the pace of change was accelerating.

> *So much for food.* Actually, beginning a very short time ago, a great many jurisdictions are now applying the rule of this section to products other than food. You will find . . . several cases applying it to articles for what might be called intimate bodily use which is external rather than internal - - things like hair dye, soap, permanent wave solutions, surgical pins for setting a bone fracture, polio vaccine in California, and then getting beyond what might be called bodily use in any sense of the word, you find very recently *a quite spectacular eruption of cases* which extended the rule of this section to other products not for external use at all. . . .
>
> *This is perhaps the most spectacular development that I have witnessed in my lifetime in the American law of Torts.*
> . . .
> [Y]ou will notice how late most of the cases are - - the *great majority of them since 1958* - - this rather *spectacular* extension of the whole thing to things like automobiles. There is a great deal of contrary authority even in the states which accept the food liability. California, for instance, thus far has refused to extend to anything beyond food . . . . They won't apply it to pumps, insecticides - - anything like that - - so that here what appears . . . is a definite minority rule. It is a minority of the jurisdictions - - about 7 or 8 of them - - which have suddenly kicked over the traces in a *spectacular fashion since 1958.* There seems to be every indication that that is spreading and spreading rapidly, but it is still a small minority.

38 A.L.I. PROC. 51-52, 71-72 (1961) (emphasis added) [CP 115-16, 118-19]. By the end of the meeting, Prosser had convinced the ALI that the "spectacular" development of the law since 1958 warranted expanding the

grant of strict liability from food products to products intended for "intimate bodily use." Prosser was directed to redraft the section accordingly, expand the comments and resubmit them the following year. *Id.;* 41 A.L.I. PROC. 349 (1964) [CP 122].

Remarkably, however, by the time the ALI reconvened in 1964 to discuss the revised draft, Prosser felt it necessary to propose yet *another* expansion - - this time, to *all* products - - due to the continued, "explosive" expansion of the law since the prior revised draft. *Id.* at 349-50 [CP 122]. Indeed, Prosser noted:

> [I]t becomes apparent that if our Section of the Restatement which we have approved is to be published this summer in Volume 2 of the Restatement, it will be on the verge of becoming dated before it is published.
>
> . . .
>
> *[T]his is the speediest development in the law of torts that I have encountered in my lifetime, as well as being one of the most spectacular.*

Id. at 350-51 (emphasis added) [CP 123]. After lengthy discussion, the ALI approved the expansion of 402A strict liability to all products and the section was published in its current form in the 1965 Restatement.

The foregoing history amply demonstrates that in *1958* (when Mr. Lunsford claims exposure to dust from Brower products), *no one* -- not William Prosser, not The American Law Institute, *and certainly not Brower* -- could have foreseen the "spectacular" development of the law

of strict liability that would ultimately lead to §402A in 1965, its adoption in *Ulmer* in 1969 as to manufacturers, and its adoption in *Tabert* in 1975 as to product sellers. Under the Lunsfords' proposed retroactivity analysis, these decisions were certainly were not "clearly foreshadowed" in 1958.

b. The *Ulmer* and *Tabert* decisions overruled prior decisions that, with few exceptions, limited "strict" liability claims to persons having privity.

As explained above, prior to 1958 "strict liability" under Washington court decisions for injuries resulting from defective products existed only to the extent that an injured party could meet the requirements of a warranty theory (with privity) or an implied warranty theory (under narrow exceptions for, e.g., food products, products intended for intimate bodily contact). *See* discussion *supra* at 10-11. *Ulmer* and *Tabert* removed those limitations and created a new cause of action for strict products liability. As discussed above, this was not simply an evolution of prior law; it was a spectacular, dramatic and fundamental change in preexisting rights and tort remedies.

c. Retroactive application of the *Ulmer* and *Tabert* decisions would be inconsistent with the purposes of strict liability.

The purposes of strict liability will not be furthered by applying *Ulmer* and *Tabert* retroactively to events occurring in 1958. Indeed, under the unique circumstances of asbestos litigation, the theoretical underpinnings of 402A strict liability are simply absent.

The stated rationale underlying strict liability is to compensate injured parties through a mechanism that spreads the costs and risks associated with the product. Brief of Appellants at 7. According to this rationale, imposing liability without fault upon the product manufacturer or seller makes sense, since they are in better position to spread the risk and/or absorb the loss through product liability insurance and/or by adjusting the price of the product to cover the costs of insurance and the risks of injury. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS §402A, cmt. c (1965) (stating policy that "the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained"). *See generally* Cortese & Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws*, 9 J.L. & COMM. 167, 175, 181-82 (1989) ("[A]vailability of product liability insurance is critical to the validity of the cost-shifting theory underlying strict liability").

The risk-distributing goals of strict liability would not be served by retroactive application of *Ulmer* and *Tabert* to events occurring or products sold in 1958. Since strict products liability did not even exist and was utterly unforeseeable in 1958 (it would not exist for product sellers like Brower until *1975*), Brower and other product sellers would have had no reason whatsoever to procure insurance against such risks in 1958. Social and tort policy may reasonably expect product manufacturers and sellers to insure against *conceivable* risks, but it cannot reasonably expect them insure against the *inconceivable* risks that do not exist under current or foreseeable developments in the law and that would not come into existence for perhaps decades. *See* Henderson & Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1517 (1992).

Similarly, just as Brower cannot reasonably have been expected in 1958 to obtain insurance against non-existent risks, it likewise had no reason to raise the price of its insulation products incrementally and

thereby spread the cost of a non-existent risk among its purchasers.[22] Indeed, in the case of a non-existent risk, how would Brower know by what incremental margin the price should be increased? Sound social policy can require commercial prudence and foresight, but not clairvoyance. Brower cannot be expected in 1958 to have either obtained insurance against, or to have incorporated into its product pricing structure, the cost of unforeseeable liability, on causes of action that might be developed in the coming decades and asserted in a lawsuit 44 years in

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[22]Indeed, in the context of this case, the extent of any supposed risk-spreading function associated with the Lunsfords' strict liability claim is truly minimal. Here, the date of sale of the allegedly defective product (1958) and the date of the Lunsford's resulting claim (2002) are separated by *more than 40 years*. The product in question, asbestos-containing thermal insulation, has long been off the market and in fact is currently banned. *See* 40 CFR 763.163 *et seq*. (2005); S. Rep. No. 109-97, at 15 (2005), *available at* http://thomas.loc.gov (search "s.852" in bill text, then select hyperlink to S.852.RS, then select "Link to Senate Committee Report 97"). Most of the major insulation manufacturers have gone bankrupt due to the "elephantine mass" of asbestos litigation. *Id.* at 19; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S.Ct. 2295, 144 L. Ed.2d 715 (1999). Thus, the cost of Brower's strict liability to the Lunsfords could not be spread through adjusting either Brower's or the manufacturers' price for the product, nor can Brower spread the cost by obtaining insurance.

This same grim predicament faces more than *8,400* U.S. companies involved in asbestos litigation today, and the numbers are growing, as individual plaintiffs like the Lunsfords sue scores of defendants in multiple suits. S. Rep. 109-97, at 12; CP 93-94 (service list of 37 companies in Lunsfords' California suit). Asbestos litigation has forced more than 70 companies into bankruptcy, with more bankruptcies between 2000 and 2004 than in the 1970's, 1980's and 1990's combined. More than 60,000 jobs have been lost, and future bankruptcies are expected to rise exponentially. *Id.* at 14, 20. The plight of those who suffer from serious asbestos disease is tragic, indeed; but plainly the risk-spreading policy that the Lunsfords cite to support 402A strict liability has little merit or relevance in asbestos litigation.

the future.[23] In planning, conducting and protecting its business in 1958 Brower was entitled to rely upon the liability limitations and theories that the Washington courts had announced before then. Thus, retroactive application of *Ulmer* and *Tabert* would not support the stated risk-spreading policies that underlie strict liability.

d. Retroactive application of the *Ulmer* and *Tabert* decisions is inconsistent with public policy as declared by the Washington State Legislature.

In arguing that strict liability under 402A should apply to their claim arising from exposure in 1958, the Lunsfords rely heavily on what they consider to be the primary if not sole policy of 402A strict liability: to guarantee compensation, i.e., "*the maximum of protection*", to injured persons, at the expense of whomever marketed the products, regardless of fault. *See* Brief of Appellants at 7-8, *quoting* RESTATEMENT (SECOND) OF TORTS 402A, cmt. c (1965) (emphasis added). This policy of affording the

[23]The Lunsfords' contention (Brief of Appellants at 8 n. 2) that coverage under a commercial liability policy issued in 1958 was typically on a *claims made* basis and would have covered any risks, foreseeable or not, is unsupported. More importantly, however, it begs the question. Brower could *never know* how much insurance to purchase to protect itself against unknown and unforeseeable liabilities and theories of liability that might develop in the coming decades. Having no idea in 1958 that as a product seller, it might - - *decades later* - - be held liable to non-customers for products sold in 1958 without regard to its fault, Brower would have no rational means by which to determine the appropriate insurance limits to purchase to protect itself against the massive increase in risk that would develop in the future.

"*maximum of protection*" to injured persons apparently trumps all others, no matter the resulting impact on commerce, business, insurance and employment.

Even if such was the policy of the State of Washington as of 1969 and 1975 (when *Ulmer* and *Tabert* were decided), it ceased being the policy of this State shortly thereafter, when the Legislature passed substantial reforms to the state tort system in 1981 - - reforms that were in substantial part *necessitated by Ulmer, Tabert and 402A*. Momentum for change at the legislative level began almost immediately after the *Tabert* decision in 1975 and increased over the next four years as the product liability controversy continued. SENATE JOURNAL, 47th Leg., Reg. Sess., at 618 (Wash. 1981). Fueling this controversy was the perception (confirmed by the Senate Select Committee on Tort and Product Liability Reform) that the cost of products liability insurance was "skyrocketing" between 1974 and 1976, creating "a product liability crisis" in Washington. *Id.* at 622. Insurance rates for bodily injury and property damages jumped 75% in the 1974-75 period. While products liability insurance remained available in the late 1970's, *affordability* was problematic. *Id.* at 623.

Among the areas of greatest concern specifically identified by the Senate Select Committee and seen as contributing to the insurance and

product liability crisis were the 402A strict liability standards recently adopted in *Tabert*[24], as well as the joint and several liability exposure of non-manufacturing product sellers.[25] In drafting and ultimately enacting legislation to address and correct such concerns, the Legislature made no secret of its concern over existing products liability law and underlying policy, and the need for reform:

> The purpose this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.
>
> Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial motivation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

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[24]*See* SENATE JOURNAL, 47th Leg., Reg. Sess., at 624-25 (Wash. 1981) ("With its adoption of Section 402A . . . the Washington court has *purported* to extend strict liability to manufacturers of defective products, regardless of the nature of the defect" (emphasis added)).

[25]*See* SENATE JOURNAL, *supra*, at 632 ("One of the complaints most frequently expressed before the Legislature during the whole course of the product discussion over the past few years has been the alleged inequity of holding the non-manufacturing product seller liable for product defects over which it had no control . . ."); 1981 FINAL LEGISLATIVE REPORT, 47th Wash. Leg., at 126 ("Proponents of legislation point to the significant increase in product liability insurance premiums which occurred in the early 1970's which they say resulted from judicial decisions increasing the exposure of product sellers to liability for defective products"); Philip Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 5-6, n.28 (1981) (Senate Select Committee Chairman attributes "extreme variations" in product liability insurance premiums from 1973-79 to uncertainty among insurers about the trend in Washington product liability law).

LAWS OF 1981, ch. 27, §1. Accordingly, reform legislation proceeded from a new, more balanced public policy, in which the interests of *injured consumers*, while important, did not trump all others:

> It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer *in a balanced fashion* in order to deal with these problems.
>
> It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be *unduly* impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

Id. (emphasis added). To restore a more balanced products liability system, the 1981 WPLA contained important changes benefiting product manufacturers and sellers, including a substantial limitation of liability for product sellers (such as Brower), allowance of evidence of state of the art, provision of an absolute defense where a product is in compliance with government specifications, a 12-year statute of repose/useful safe life, and adoption of comparative fault. *See* RCW 7.72.030 *et seq.*

If the Lunsfords are correct that 402A, *Ulmer,* and *Tabert* embodied a monolithic policy of compensating injured consumers - - i.e., to guarantee them "*the maximum of protection*" - - then that fact today is of merely historical significance; it has *not* reflected Washington products

liability policy *since 1981*. Applying 402A strict liability to an exposure in 1958 would unnecessarily and unwisely perpetuate and expand the unsatisfactory products liability scheme that forced broad legislative reform in 1981. The WPLA represents *current* public policy, which favors a *balanced* approach to protect the interests of manufacturers, products sellers and insurers, while not "*unduly* impairing" the recovery rights of injured consumers.

e. Retroactive application of the *Ulmer* and *Tabert* decisions would not be equitable in this case.

The equities militate strongly against retroactive application of *Ulmer/Tabert* in this case. As discussed above, Brower could have had no inkling in 1958 that it might one day be held liable, regardless of fault, to persons other than its customers for injuries caused by its products. Because the risk of such liability was non-existent and unforeseeable, there is simply no plausible means by which Brower could have or should have acted to protect itself or to distribute the costs that might one day be imposed. It would be unjust to impose strict liability upon Brower retroactively under the circumstances.

In contrast to the inequity that would result for Saberhagen if the Lunsfords' strict liability claims are allowed, no inequity will result for the Lunsfords if the strict liability claims are dismissed. They will retain

precisely the same legal claims - - no more and no less - - as every other person who was injured by a product in Washington State in 1958.

The Lunsfords have never disputed the fact that if Mr. Lunsford had become ill *in 1958* as a result of his exposure (instead of 42 years later) and had sued Brower that same year, he would have had no cause of action for strict liability and could only assert a negligence claim. The same is true if he had become ill in 1959, or 1960, or even as late as 1970. Indeed, the *only* reason that Mr. Lunsford can even advance the argument for strict liability is because his illness did not show up until 42 years after the exposure that supposedly caused it and because, in the interim, the law has developed in a way he sees as more favorable. Certainly the nature of a product seller's liability should not turn upon how long it takes for the injury to manifest itself. Mr. Lunsford's remedies should be no greater than those of any other similarly-situated person injured by an allegedly defective product in Washington in 1958.[26]

[26]In any event, even if it is somehow a hardship for the Lunsfords to pursue Saberhagen with only a negligence claim, Washington courts have repeatedly noted that prospective-only application of certain judicial decisions is appropriate, even if "of necessity, hardships result." *Erdman v. Lower Yakima Valley B.P.O.E Lodge No. 2112,* 41 Wn. App. 197, 212, 704 P.2d 150 (1985). *See also Cunningham v. Lockard,* 48 Wn. App. 38, 42, 736 P.2d 305 (1987).

Accordingly, even if the Court were to entertain a "retroactivity analysis" as now proposed by the Lunsfords, the results of that analysis plainly show that:

1. Brower could not possibly have foreseen in 1958 the development of 402A strict liability or its adoption in *Ulmer* and *Tabert* in 1969 and 1975;

2. The *Ulmer* and *Tabert* decisions fundamentally changed the liabilities of product manufacturers and sellers and overruled the law in effect in 1958, allowing claims and claimants that had previously been barred;

3. In assessing its insurance needs, its product pricing and its product testing duties in 1958, Brower had a right to rely upon the state of the law and the claims and remedies then available;

4. Retroactive application of *Ulmer* and *Tabert* would not advance the risk-spreading policies that underlie 402A;

5. The Washington State Legislature has determined that implementation of the policies underlying 402A and the *Ulmer* and *Tabert* decisions has led to a product liability crisis, requiring fundamental and sweeping reforms and a more balanced state products liability policy; and

6. Retroactively applying *Ulmer* and *Tabert* would result in substantial prejudice to Saberhagen by imposing the burden of unforeseeable risks, while dismissing the Lunsfords' strict liability claims would leave them with precisely the same rights as any other person injured by a product in 1958.

f. The Lunsfords' retroactivity authorities have little in common with the law and circumstances of this case and are readily distinguishable.

The unique and dramatic circumstances present in this case make it readily distinguishable from the Lunsfords' authorities. *Harvey v. General Motors Corp.*, 739 P.2d 763 (Wyo. 1987), for example, involved the question of whether a 1986 Wyoming appellate decision adopting strict liability (*20 years after* the ALI's publication of 402A and long after its adoption by "the overwhelming majority of American jurisdictions") should apply retroactively to an injury caused by a 1979 car. Under the circumstances, the 1986 decision adopting strict liability was "clearly foreshadowed [at the time the car was manufactured in 1979] by persuasive authority in other jurisdictions" and, given the short intervening period, there could be no genuine claim of substantial resulting inequities. *Id.* at 766 (Thomas, J., concurring).

The Lunsfords' reliance on *Leland v. J.T. Baker Chemical Co.*, 282 Pa. Super. 573, 423 A.2d 393 (1980) is likewise misplaced. *Leland* concerned an accident in 1965, that led to a lawsuit in 1966, that remained pending until a 1975 trial. At trial, a jury instruction was given that embodied 402A's "unreasonably dangerous" standard for defective products. While post-trial motions were pending, the state supreme ruled that 402A's "unreasonably dangerous" standard was improper and should

not be included in strict liability jury instructions.[27] In deciding that the overruling decision *should* apply retroactively to the case at bar, the court applied a multifactor retroactivity test drawn from *Chevron Oil, supra,* and concluded that, among other things, (1) the defendant product seller could not have relied upon the preexisting law (402A) *since Pennsylvania had not adopted 402A at the time of the accident,* (2) retroactive application under the circumstances presented would further the policies of strict liability; and (3) failing to apply the new rule retroactively would have the effect of letting stand a jury verdict that was based on a misleading instruction. 282 Pa. Super. at 581. In short, the products seller in *Leland* had failed to make anywhere near the compelling showing that Saberhagen has.

D. This Court Should Affirm the Denial of the Lunsfords' Motion to Strike, Since Their Arguments Are Not Supported by Citation of Authority nor Consistent with Applicable Law.

In support of its partial summary judgment motion, Saberhagen submitted various materials and publications of the ALI, relating to the history, development and drafting of 402A. The Lunsfords sought to

[27]In contrast to the present case, in which the overruling state court decision (*Ulmer*) *adopted* 402A *in place of* the preexisting law of implied warranty, in *Leland* the preexisting law *was 402A* itself and the *overruling* decision was a new *limitation* on that rule, prohibiting jury instructions from including 402A's "unreasonably dangerous" terminology. 282 Pa. Super. at 576-77. The defendant in *Leland* argued that the preexisting law (the "unreasonably dangerous" terminology of 402A) should apply, not the subsequent overruling decision that *restricted* 402A. *Id.* at 578.

strike certain of those materials, i.e., excerpts from the published 1961 and 1964 Proceedings of the American Law Institute ("ALI documents"),[28] on the grounds that they are hearsay. CP 132-34. Saberhagen opposed the motion and the trial court properly denied it. CP 266-69, 271-72.

1. The Lunsfords have failed to support their arguments with authority as required by RAP 10.3(a)(5).

The Court should not consider the Lunsfords' challenge to the trial court's denial of their motion to strike (*see* Brief of Appellants at 20-22), since they have failed to cite authority in support of their challenges as required. RAP 10.3(a)(5); *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001), *rev. denied*, 146 Wn. 2d 1014, 51 P.3d 88 (2002). If no legal authority is cited, the court "*must assume that none exists.*" *State v. Smith*, 74 Wn.2d 744, 756, 446 P.2d 571 (1968) (emphasis added). Thus, "[a]rguments that are not supported by citation will not be considered on appeal." *Pacific Sound Resources v. Burlington Northern Sante Fe Ry. Corp.*, 130 Wn. App. 926, 941, 125 P.3d 981 (2005).

[28]The challenged ALI documents appear in the record at CP 113-26. They are also included in the Appendix hereto.

2. The ALI documents are not "evidence" and thus the hearsay rule is inapplicable.

If the Court chooses to consider the Lunsfords' challenges, it should affirm the denial of the motion to strike. That motion was properly denied because the challenged ALI materials are not "evidence" and therefore are not subject to the Rules of Evidence. Rather, these materials were offered to assist the trial court in analyzing an issue of law, namely, how whether the law of strict liability in 1958 was essentially the same (as the Lunsfords' contended) or substantially different than that embodied in 402A published seven years later in 1965 and adopted as to product sellers by the Washington Supreme Court in 1975.

These materials show that what was ultimately published in 1965 as 402A was not a simple "reformulation" of long-established law, but in fact had emerged from case law that was developing at an unprecedented pace. These materials demonstrate beyond question that the broad strict liability embodied in 402A as published in 1965 had not even been dreamed of by the ALI just five years earlier. Notably, the *Tabert*

considered ALI materials for precisely the same purpose.[29]

The ALI materials are not evidence and therefore they are no more barred by the hearsay rules than are statutes, case reports or law review articles. They are instead akin to legislative history underlying statutory enactments; they are in effect the legislative history of the Restatement (Second) of Torts. The trial court's consideration of legislative history does not constitute the taking of "evidence." *State v. Ford Motor Co.*, 99 Wn. App. 682, 691, 995 P.2d 93 (2000). Courts may and routinely do consult and rely on records of discussions among lawmakers or committee notes when interpreting a statute without any concern for the hearsay rule. *See, e.g., Brown v. State*, 155 Wn.2d 254, 119 P.3d 341, 346-347 (2005); *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 285, 966 P.2d 355 (1998) (considering advisory committee's notes under Fed. R. Evid. 801(d)(2)). The ALI materials were thus properly considered by the trial court.

29

> The rapidity of change in this area of the law is shown by the Institute's expansion of the strict liability theory while it had various drafts under consideration. Tentative Draft No. 6 (1961) limited strict liability to food for human consumption. The theory was expanded the next year in Tentative Draft No. 7 (1962), to include any product intended for intimate bodily use. The final version, adopted in 1964, encompassed all products.

Tabert, 86 Wn.2d at 147-48.

3. Even if the hearsay rule were applicable, the ALI documents are admissible.

Even if the hearsay rule were applicable to the ALI documents, those documents are admissible under the "hearsay exception for "ancient documents." Under ER 803(a)(16), authentic documents that have been in existence 20 years or more are not excluded under the hearsay rule. The ALI documents are properly authenticated under ER 901(b)(8) and self-authenticated under ER 902(f). They have clearly been in existence for more than 20 years and the Lunsfords made no effort to challenge their authenticity. Moreover, even if the ALI documents were hearsay, they would be admissible under ER 803(a)(16) and even in the absence of a stated basis for the trial court's denial of the motion to strike, this Court may affirm that denial on that basis. *See Rains v. Wash. Dep't of Fisheries*, 89 Wn.2d 740, 744, 575 P.2d 1057 (1978).

V. CONCLUSION

Saberhagen respectfully requests that this Court affirm the trial court's order granting partial summary and dismissing the Lunsfords' strict liability claim. The Lunsfords had no valid claim for strict liability because such a cause of action *did not exist* under Washington law in 1958 when Mr. Lunsford was allegedly exposed to and injured by Brower-supplied asbestos and when his claims, if any, arose. Indeed,

Washington's adoption of a strict liability cause of action as to product sellers like Brower was 17 years in the future.

Restricting the Lunsfords' remedies to those available in 1958 is neither unfair nor inequitable, and none of their arguments (including those raised for the first time on appeal) warrant the untenable conclusion that *asbestos-plaintiffs* injured in 1958 should receive special and greater remedies than those that were available to other persons injured by other products in 1958, or that *sellers* of asbestos products in 1958 should be singled out among all other product sellers that year for the retroactive imposition of new, entirely unforeseen and staggering theories of liability.

The trial court should be affirmed.

DATED this 25th day of August, 2006.

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